IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1219 of 1993

to

CRIMINAL APPEALNo 1220 of 1993

with

CRIMINAL REVISION APPLICATION No 351 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

TARACHAND DHANJIBHAI DHOBI

Appearance:

1. Criminal Appeal No. 1219 & 1220 of 1993

Ms.Hansa Punani, learned A.P.P.for Appellants.

Mr.B.Y.Mankad for Mr.U.M.Shastri for respondents.

2. Criminal Revision Application No. 351 of 1993

Mr.B.Y.Mankad for MR UM SHASTRI for Appellants.
Ms.Hansa Punani, learned A.P.P. for Respondents.

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 01/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

#. Criminal Appeal No.1219 of 1993 is filed by the State under Section 377 of the Criminal Procedure Code for enhancement of sentence imposed on the accused and Criminal Appeal No. 1220 of 1993 is filed by the State under Section 378 of the Criminal Procedure Code against the order of acquittal of the accused vide judgment and order dated 6.8.1993 in Sessions Case No.241 of 1992 passed by the Additional Sessions Judge, Panchmahals at Godhra wherein the respondent-original accused was facing the charge under Section 21 of the Narcotic Drugs and Psychotropic Substances Act,1985 (NDPS Act for short) wherein, at the end of the trial, he was acquitted by the learned Sessions Judge for the offence under Section 21 of the NDPS Act, but was convicted for offence punishable under Section 27(2) of the NDPS Act for 3 months simple imprisonment and fine of Rs.100/-, in default, 7 days simple imprisonment for which he was not charged. Criminal Revision Application No.351 of 1993 is filed by the accused against the conviction and sentence imposed by him by the above referred judgment and order.

#. The brief facts of the present case are as under :

On 07.06.1992, when P.I. Godhra Town Police Station along with police constable Mansinh Dasratsinh, Kiransinh Balwantsinh were on night patrolling at 0.15 hours and when they reached Fareast Company situated at Dahod-Godhra highway, he found two persons in suspicious position coming from Godhra side. On interrogation, they cannot give satisfactory answer. Out of the said two persons, one person gave his name as Tarachand Dhanjibhai Dhobi, the present respondent residing at Savliwad, Godhra. On search of his person, in the hip side pocket of the pant, currency notes of Rs.37/- and one packet were found. On smelling and getting it smelled by panchas, they were convinced that it was charas weighing 400 M.grams worth Rs.20/-.

The complaint on behalf of the State was registered at Godhra Town Police Station and further investigation started. The accused was arrested and taken into judicial custody and the muddammal was sent to F.S.L. and after receiving the opinion of the F.S.L. expert, chargesheet was submitted and same was registered as Sessions Case No.241 of 1992 and it was transferred to the Court of learned Additional Sessions Judge who framed the charge at exh.2 on 3.6.93 against the respondent-accused for the offences punishable under Section 21 of the N.D.P.S.Act. The charge was read over and explained to the respondent-accused who pleaded not guilty and claimed to be tried. Therefore, the prosecution examined in all five witnesses i.e. (1) P.W.No.1 Jagdish Virumal Kamnani Exh.6, (2) P.W.No.2 Meghalay Nathamal Karamchandani Exh.7, (3) P.W.No.3 Jagdishkumar Dhanjibhai Nirmal Exh.8, (4) P.W.4 Girvansing Kanaksing Solanki Exh.14, (5) P.W.5 Vijaykumar Tuljaram Navle Exh.17. The prosecution also produced documentary evidence viz. panchanama Exh.16, Complaint Exh.15, Receipt from F.S.L. Exh.9, F.S.L.report Exh.11 etc. On submission of the closing pursis by the prosecution, the learned Sessions Judge recorded further statement of the accused under Section 313 of the Criminal Procedure Code. Thereafter, after hearing the learned counsel for the respective parties, the learned Sessions Judge passed judgment and order as stated above.

#. Ms.Hansa Punani, learned A.P.P. has taken us through the oral as well as the documentary evidence on record along with the reasoned judgment delivered by the learned Additional Sessions Judge and argued that it has been proved beyond reasonable doubt that the muddammal in question has been recovered from the possession of the accused and therefore ought to have believed and convicted the accused under Section 21 of the N.D.P.S.Act. It has been further argued by the State that State has also preferred an appeal for enhancement of the sentence which has been imposed by the Court below under Section 27 of the N.D.P.S.Act wherein he has been convicted for three months instead of six months. It has been further argued that the muddammal in question is a contraband article charas as per the opinion of the F.S.L. expert and therefore once it has been proved that the muddammal in question is recovered from the possession of the accused and it is a contraband article, the Court below ought to have convicted the accused for the crime in question under Section 21 of the Act.

#. Mr.B.Y.Mankad has submitted that while carrying out search and seizure of the accused, the prosecution has

not followed any of the provisions from Sec.42 to Sec.58 of the Act. Since the mandatory provisions of Secs.42 and 50 of the Act were not followed by the prosecution, the conviction will be vitiated. He has also taken us through the evidence on record including the complaint and other oral as well as documentary evidence and argued that while doing so, not a single procedure as required under the relevant provisions of the Act has been followed by the prosecution and hence, it is requested that sentence imposed by the court below as provided under Sec.27 of the Act may be quashed and set aside and he may be acquitted, as it is contrary to law.

#. We have gone through the oral as well as the documentary evidence as also the impugned judgment delivered by the court below. It reflects from the record that before doing search and seizure, prosecution has not informed the accused regarding his valuable right of search and seizure in presence of an Executive Magistrate or a Gazetted officer. It is established from the record that the muddammal alleged to have been seized from the accused has not been weighed either on the spot or even later on. There are no evidence to the effect that muddammal in question has been kept in proper custody and it is also not proved by the prosecution that the muddammal received by the FSL analysed by the FSL authority are the same. It has been alleged to have been seized from the accused. Moreover, the date of incident is 7.6.1992 and the muddammal has been handed over to Police Constable Divakar on 12.6.1992 while it was handed over to FSL on 15.6.1992. However, there is no satisfactory explanation forthcoming as to whether the muddammal handed over to Police Constable Divakar remained in tact condition till it was reached at the FSL. Hence, in view of the decision rendered by the Apex Court in the case of State of Punjab V/s Baldev Singh 1999(6) SCC 172 which is reiterated in the cases of Bekodam Abdul Rahim V/s State of Kerala JT 2002 SC 68 and Abdul Rahim Ibrahim Mansuri V/s State of Gujarat 2000(2) SCC 513, the conviction is vitiated.

#. Criminal revision application no.351 of 1993 is hereby allowed. The judgment and order of conviction dated 6.8.1993 passed by the learned Sessions Judge, Panchmahals at Godhra in Sessions Case No.241 of 1992 against the petitioner-original accused, Mr.Tarachand Dhanjibhai Dhobi for the charge under Section 27(2) of the Act is quashed and set aside and the petitioner is acquitted of the said charge and in view of the above, both the appeals filed by the State i.e. Criminal Appeal Nos.1219 of 1993 and 1220 of 1993 are required to be dismissed and dismissed accordingly.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

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